

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10686 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?-Yes.
2. To be referred to the Reporter or not?-No.
3. Whether Their Lordships wish to see the fair copy of the judgement?-No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No.
5. Whether it is to be circulated to the Civil Judge?-No.

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PRANSHANKAR BHAISHANKAR DAVE

Versus

STATE OF GUJARAT

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Appearance:

MR ASHOK K PADIA for Petitioner

MR DA BAMBHANIA for Respondent No. 1

MR HS MUNSHAW for Respondent No. 2, 3, 4, 5

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CORAM : MR.JUSTICE R.BALIA.

Date of decision: 02/05/97

ORAL JUDGEMENT

This Special Civil Application is filed claiming following reliefs :-

"15. It is therefore, prayed that :-

- (a) A writ of mandamus or like writ or order or direction may be issued against the respondents to grant the increments which become due on dt. 1-1-75 and 1-1-76 and dt. 1-1-92, 1-1-93 and 1-1-94 and to pay to the petitioner with arrears.
- (b) A writ of mandamus or like writ order or direction may be issued to the respondents to give benefit of the 9-20-31 Higher scale scheme to the petitioner.
- (c) A writ of mandamus or like writ or order or direction may be issued to the respondent to prepare the pension paper of the petitioner so that he may get his pension, P.F., commuted pension and gratuity at due time.

xxx xxx xxx "

The petitioner was appointed as a Primary Teacher on 16.6.1956 in the then State of Saurashtra and he continued to hold the said post in the State of Gujarat on its formation until he superannuated on 30th September, 1994.

The facts relevant for the present purposes in the context of aforesaid reliefs may be noticed. Since retirement, petitioner's pension papers have not been prepared, his claim to five annual increments, which became due on 1.1.1975, 1.1.1976, 1.1.1992, 1.1.1993 and 1.1.1994, had not been released and he had not been given the pay hike at envisaged intervals under the higher pay scheme as was in force from time to time.

So far as facts relating to increments due on 1.1.1975 and 1.1.1976 are concerned, by order dated 2nd August, 1974, in a disciplinary enquiry against the petitioner, he was visited with a punishment of stoppage of two grade increments with cumulative effect. That order remained unchallenged until 1991 when petitioner had challenged the said order in Special Civil Application No. 1337 of 1991. The petition was dismissed by a learned single Judge of this Court on the ground of laches, which order was affirmed in Letters Patent Appeal No. 214 of 1992 dated 4th May, 1992. Special Leave Petition against the same before the Supreme Court also met the same fate. Thus, the order of

punishment, stopping two grade increments with future effect having become final, the petitioner cannot claim increment, which fell due immediately on two succeeding dates of increment after 2nd August, 1974. In that view of the matter, the petitioner is not entitled to relief claimed in respect of release of grade increments as on 1.1.1975 and 1.1.1976.

So far as the claim of the petitioner to secure grade increments, which fell due on 1.1.1992, 1.1.1993 and 1.1.1994, is concerned, the undisputed facts are that while the petitioner was working at Village Bala of Wadhwan Taluka, he was transferred to village Kuda by order dated 2.6.1990. That order of transfer was challenged in Special Civil Application No.1647 of 1991, in which, in the first instance, execution, operation and implementation of the transfer order dated 2nd January, 1991 was stayed until 15.4.1991, which was an intra-District transfer. The petition was decided on 16.7.1991, leaving the petitioner to make a representation for transferring him to a place within Wadhwan Taluka and directing the status quo to be maintained until that representation is decided. With the aforesaid arrangement, the petition was dismissed as withdrawn on 16.7.1991. Thereafter, by order dated 24th July, 1991, the earlier transfer order was modified by naming the new place of transfer as Vastadi Primary School in Wadhwan Taluka. This order was also challenged by Special Civil Application No. 5350 of 1991. By order dated 12th August, 1991, the execution and operation of the transfer order dated 24.7.1991 was stayed, with a further direction to keep one post vacant in City Wadhwan or in Dudhrej School No.2. The Court also directed respondent No.1 about availability of any vacancy at the places named in the order. This litigation also, ultimately, failed before a single Judge as well as a Division Bench of this court. Finally, when the matter was taken to the Supreme Court by the petitioner, S.L.P. was disposed of in the following terms :-

"... Delay condoned.

We do not propose to interfere with this matter subject to modification of one position, namely, the petitioner shall join at the place of posting namely, Vastadi within a period of two weeks from today. His absence from duty will be considered according to Leave Rules and it would be done accordingly and salary shall be paid within two months. The S.L.P. is disposed of with the

above observations...."

From the aforesaid, it is apparent that looking to the chequered history of litigation while the Apex Court had refused to interfere with the order of transfer and directed the petitioner to join at the place of posting, viz., Vastadi, it also contained directions to the respondent to consider the period of absence from duty relating to the non-joining at the new place of posting under Leave Rules and payment of salary in terms of the period of absence being adjusted against the various nature of leaves as could be availed of by the petitioner during that period as per his leave account and other Regulations. Obviously, this direction implied that leave application for the period could not be rejected only on the ground that it was not applied prior to proceeding on leave. Moreover, the direction to pay salary within two months further implies that it is only after adjusting the period of absence from duty against the various types of leave as may be available to the applicant under his leave account and under the Rules, he may be paid salary as per adjustment of that period and not full salary for the entire period automatically. However, it did not imply that the period of absence is to be treated as absence from duty by rejecting the application for leave for this period on the supposed discretion vesting in the authority to accept or reject the application and particularly with reference to the default on the part of the applicant to apply for leave in advance. However, from the reply affidavit, I find that the application has so far not been decided as there is no averment to that effect, but what has been stated is :-

"... However, the Honourable Supreme Court of India held that needful may be done about the wages in accordance with the rules and regulations. It is pertinent to note that the petitioner did not resume his duty even at village Vastadi till 10th January, 1994. In other words, he has not worked from 19th January, 1991 till 10th January, 1994 barring short period i.e. 19th November, 1991 to 24th November, 1991 which was a joining period and 25th November, 1991 to 15th January, 1992 which was a sick leave period. In these circumstances, the petitioner's case for salary as well as increments can be decided only on the basis of the rules and regulations as held and directed by the

Honourable Supreme Court of India. It is pertinent to note that the petitioner had applied for leave for the period from 20th March, 1991 to 1st January, 1994 on 11th January, 1994 and requested to regularise the period of absence and make payment of full salary. The said request is refused as it is contrary to the rules and regulations...."

At yet another place, it has been stated :-

"... It is submitted that in fact the petitioner has not worked for three years without prior permission. It was the case of absenteeism. The petitioner has not worked from 10th January, 1991 till 10th January, 1994. In these circumstances, his case is required to be considered as per the rules and regulations...."

It does not require an assertion that the petitioner was absent during this period without leave. It is because the petitioner was absent without leave a direction was required to be made by the Honourable Supreme Court to consider the period of absence under the Leave Rules. If the petitioner would have applied for leave beforehand and the same would have been granted, there would have been no case of absenteeism without leave requiring further consideration of the period of absence under Leave Rules. Moreover, there is specific direction of the Supreme Court to pay salaries after considering the period of absence under Leave Rules, which indicates that the application could not be rejected or refused to be considered simply on the ground that he has remained absent without prior permission for the period of three years. Therefore, in my opinion, respondents were not justified in not considering the petitioner's application for leave for the period during which he had remained absent as a result of his transfer from Bala to other places in the wake of litigation, which was pending in respect of those orders and orders made thereunder. It cannot be lost sight of that both the orders, in the first instance, were stayed by the orders of the Court, during which petitioner was justified in not to have joined at the respective places of new postings. Obviously, unless the absence period is adjusted against the leave and accounted for, the question of paying salaries for that period would not arise as it would not be possible to compute the same. If the period of absence is considered under Leave

Regulations and is accounted for, then the question of denying the increments which fell due during that period would also not arise. Therefore, in my opinion, the petitioner is entitled to relief in respect of seeking a direction to the respondents for deciding his case for grant of leave for the period of absence between January, 1991 and 10th January, 1994 and determination of payments to be made for that period in accordance with decision on his leave application afresh in accordance with law keeping in view the directions of the Supreme Court and observations made hereinabove.

The third relief to which the petitioner has laid claim is in respect of release of higher grade benefits under the Scheme, known as "9-20-31 Higher Scale Scheme". The petitioner has stated that he had completed 27 years of service as on 1.6.1987 and he became entitled to such increased increments as per the existing scheme prior to coming into force of the new scheme dated 16.8.1994. It has also been urged that since the scheme dated 16.8.1994 has not been made applicable to teachers who retired prior to 1.8.1994, but has been made applicable to the persons who are in service as on 1.8.1994, the same is being discriminatory and the petitioner should be given benefit of the existing scheme prior to 1.8.1994 to which he has secured entitlement.

Having carefully considered and perused the Scheme, I am of the opinion that this contention of the petitioner founded on the plea of irrational classification in extending the advantage of the previous scheme and restricting the advantage under the new Scheme is not well-founded. From the perusal of the Scheme, particularly Clause (3) of paragraph 3, it prohibits recovery of amounts already paid under the old scheme on being re-fixation of the new Scheme from those who have retired prior to 1.8.1994, but there has been no classification in the matter of applicability of the scheme to all those who have retired prior to 1.8.1994 or those who have retired after 1.8.1994. This scheme has been brought into force on 16th August, 1994 by substituting the new Scheme in place of the old Scheme ab initio which required the re-fixation of the higher scale in terms of the new Scheme in place of old fixation. In doing so, anticipating that certain recoveries may have to be made, it provided for no recovery from the persons who have already retired before the promulgation of the Scheme. Therefore, it cannot be said that any unreasonable, arbitrary or irrational classification has been made in providing for no recovery from persons, who have retired before the promulgation of the new Scheme.

However, the petitioner states that he had not been given the benefit of the higher scale under the new Scheme while fixing his salary and making him payment on retirement. In fact, one of his major grievances is pension or his retiral benefits has not been determined. To that extent, the petitioner's grievance is justified. Petitioner has already made his representation which the respondents ought to consider and decide within a reasonable period along with deciding his application for leave for the period during which he remained absent, viz., from 10th January, 1991 to 10th January, 1994, and on that basis to determine the case of the petitioner for pension and other benefits.

As a result of the aforesaid discussion, this petition is partly allowed. The respondents are directed to consider the petitioner's case for grant of leave, which is due to him or which could be granted to him under Leave Regulations concerning the period of absence relating to transfer to Vastadi in terms of Supreme Court directions and pay salaries as would be due to him as a result of such determination. After considering the period of leave, the petitioner's claim to annual grade increment when they became due during the period of his continuance in the service as 1.1.1991, 1.1.1992 and 1.1.1993 will also be decided. It may be noticed in this connection that as per averments made in the reply affidavit, the petitioner was absent with effect from 10th January, 1991, whereas increments from 1991 had become due on 1st January, 1991. Therefore, in no circumstances, increment for 1.1.1991 is governed by leave adjustment. The petitioner's plea for release of higher pay scale in terms of existing scheme governing the Service has also to be determined and if anything is found due as a result of such determination has to be paid. On determination of his entitlement during service period before superannuation, the petitioner is further entitled to be considered for his entitlement to pensionary and other retiral benefits and release thereof. For all these reliefs, the petitioner may submit detailed representations afresh within a period of one month from the date of service of this writ on the respondents and thereafter, all his representations concerning the aforeaid reliefs to be decided by the respective Competent Authorities within a further period of four months and arrears, if any, which became payable to the petitioner as result of this exercise be paid to him within two months thereafter. Rule is made absolute with no order as to costs.

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(apj)